12-18-2015

Morrison v. St. Luke's Regional Medical Center, Ltd Respondent's Brief 2 Dckt. 42625

IN THE SUPREME COURT OF THE STATE OF IDAHO

BARBARA MORRISON [redacted]

Plaintiffs/Appellants,
vs.

ST. LUKE'S REGIONAL MEDICAL CENTER, LTD., JOACHIM G. FRANKLIN, M.D.,

Defendants/Respondents,
and

EMERGENCY MEDICINE OF IDAHO, P.A.,

Defendant/Respondent.

Supreme Court Case No. 42625

Ada County Case Nos.
CV OC 1310439 and CV OC 1322751

RESPONDENTS FRANKLIN'S & EMERGENCY MEDICINE OF IDAHO'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE RICHARD G. GREENWOOD, DISTRICT JUDGE, PRESIDING

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I.
STATEMENT OF THE CASE

A. Nature Of The Case.

This appeal arises out of two consolidated medical malpractice cases wherein Plaintiffs/Appellants allege Joachim Franklin, M.D. negligently referred Mr. Morrison from the emergency department at St. Luke's when he instructed Mr. Morrison to call for an appointment with a cardiologist the following morning. Mr. Morrison passed away from an acute cardiac event three weeks after he was discharged from the emergency department, prior to his appointment with a cardiologist.

Plaintiffs sought to hold Dr. Franklin's employer, Emergency Medicine of Idaho, P.A. directly and vicariously liable for conduct leading to the referral. Dr. Franklin and Emergency Medicine of Idaho, P.A. (collectively "Defendants/Respondents") obtained partial summary judgment on Plaintiffs' direct negligence claim against Emergency Medicine of Idaho, P.A. when Plaintiffs failed to establish the requisite foundation as to Emergency Medicine of Idaho for their standard of health care practice expert.

Plaintiffs tried the remaining claims against Defendants, including co-defendant St. Luke's. At trial, Defendants presented persuasive expert testimony demonstrating Dr. Franklin complied with the applicable standard of health care practice. The jury agreed with Defendants and found Dr. Franklin did not breach the applicable standard of health care practice.

B. Procedural History.

1. Motion for partial summary judgment and related filings.

Defendants moved for partial summary judgment on Plaintiffs' direct liability claim against the Emergency Medicine of Idaho, P.A. entity on May 14, 2015.[1] *See* R., pp. 674-76. Defendants argued summary judgment should be entered in their favor on the direct negligence claim because (1) Plaintiffs could not establish Emergency Medicine of Idaho, P.A. owed a direct duty to the decedent or, alternatively, (2) Plaintiffs could not present any admissible expert testimony to establish Emergency Medicine of Idaho, P.A. breached the applicable standard of health care practice, and/or (3) Plaintiffs could not present evidence to establish any alleged breaches were a proximate cause of Mr. Morrison's death. *See* R., pp. 677-91.

Since the court did not have dates available to hear the matter in its ordinary course (twenty-eight days following the filing of the motion, or June 11, 2014), Defendants filed a motion for order shortening time to have the Motion for Partial Summary Judgment heard on June 9, 2014, as permitted by Idaho Rule of Civil Procedure 56(c). *See* R., pp. 707-09.

Plaintiffs objected to Defendants' Motion for Partial Summary Judgment. *See* R., pp. 710-11. In turn, Defendants filed a memorandum in opposition to Plaintiffs' objection because Plaintiffs' objection was procedurally and substantively deficient. It failed to comply with the requirements of Idaho Rule of Civil Procedure 7(b)(1), was itself untimely, and failed to show any prejudice by the requested change. *See* R., pp. 997-1003. Since Plaintiffs' objection was procedurally deficient, Defendants moved to strike the objection. *See* R., pp. 994-96, 1004-06.[2]

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[1] Defendants did not move for summary judgment on Plaintiffs' vicarious liability claim against Emergency Medicine of Idaho, P.A.

[2] The district court granted an order shortening time to have the motion to strike the objection heard along with the other motions on June 9, 2014. *See* R., pp. 1032-34.

Plaintiffs filed their Memorandum in Opposition to Motion for Partial Summary Judgment Filed by Emergency Medicine of Idaho, P.A., and supporting affidavits. *See* R., pp. 978-90, 712-967, 968-72. Plaintiffs also filed a Rule 56(f) affidavit to support their request for additional time to provide an affidavit from their standard of care expert, Dr. MacQuarrie, who was out of the country. *See* R., pp. 973-77.

Defendants filed a reply and incorporated a Motion to Strike Dr. MacQuarrie's Standard of Care Opinions Regarding Emergency Medicine of Idaho. *See* R., p. 1008-1015; R., pp. 1019-21; R., pp. 1022-1031. In it, Defendants argued Dr. MacQuarrie could not offer standard of health care practice opinions against Emergency Medicine of Idaho itself because Plaintiffs had failed to produce evidence to demonstrate he possessed actual knowledge of the applicable standard of heath care practice for the entity as opposed to individual physicians. *See* R., pp. 1026-30.

On June 9, 2014, the district court heard oral argument on the pending motions. *See* Tr., Vol. I, pp. 5-59.[3] The court granted Defendants' motion for order shortening time to hear the motion for partial summary judgment in part because Plaintiffs' counsel admitted there was no prejudice to him from the requested time (shortened by two days) for hearing the motion for summary judgment. *See* Tr., Vol. I, p. 28, LL. 24-25; *see also* Tr., Vol. I, p. 29, LL. 2-14.

After hearing the arguments, the court granted Plaintiffs' Rule 56(f) motion and allowed Plaintiffs seven additional days to present an affidavit from Dr. MacQuarrie to establish the foundation for his standard of care opinions as to Emergency Medicine of Idaho. *See* Tr., Vol. I,

[3] "Vol. I" refers to the Transcript on Appeal of the June 9, 2014, hearing.

p. 54, LL. 2-6; p. 55, LL. 8-22. The court specifically stated Plaintiffs were to provide an affidavit which Dr. MacQuarrie could have produced if he had been available prior to the hearing, not to obtain new foundation or offer new opinions. *See* Tr., Vol. I, p. 55, LL. 15-22.

Plaintiffs then submitted the Affidavit of Michael B. MacQuarrie and a Supplemental Memorandum in Opposition to Motion of Emergency Medicine of Idaho, P.A. for Partial Summary Judgment. *See* R., p. 1038-49; R., pp. 1050-53. Defendants responded to the same and argued the affidavit still failed to establish foundation for Dr. MacQuarrie's familiarization with the standard of care with respect to Emergency Medicine of Idaho, as opposed to individual emergency physicians. *See* R., pp. 1076-83. Defendants also asked the court to strike Dr. MacQuarrie's standard of care opinions as to Emergency Medicine of Idaho on the ground they were based upon an untimely and undisclosed conversation with Dr. Lee. *See* R., pp. 1079-80.

After consideration of the filings and oral arguments, the district court granted the Motion for Partial Summary Judgment. *See* R., pp. 1327-36. In the Memorandum Decision and Order Re: Defendant Emergency Medicine of Idaho's Motion for Summary Judgment, the court found Plaintiffs' standard of care expert, Dr. MacQuarrie, lacked adequate foundation regarding the standard of care for Emergency Medicine of Idaho. *See* R., p. 1334. As Dr. MacQuarrie lacked the requisite foundation, the court held his opinions as to Emergency Medicine of Idaho were inadmissible and granted summary judgment on the direct liability claim. *See* R., pp. 1334-35.[4]

[4] Plaintiffs moved for reconsideration of this decision, but the court denied the motion. *See* R., pp. 1337-39; R., pp. 1340-45; R., pp. 1346-51; R., pp. 1365-69. Plaintiffs have not alleged any error with denial of the motion for reconsideration on appeal. Plaintiffs have only alleged error with respect to the court's denial of its motion for summary judgment on July 15, 2014.

2. **Alleged settlement issues.**

a. Negotiations and hearing regarding St. Luke's motion to dismiss on August 8, 2014.

Prior to trial, Plaintiffs and Defendants engaged in settlement negotiations. On August 4, 2014, the parties mistakenly believed they had reached an agreement, which was subject to being reduced in writing to a settlement agreement to be prepared by Defendants' counsel. However, due to an intractable disagreement over the language of the proposed release, it became apparent the parties had not agreed to all material terms.

On August 6, 2014, St. Luke's moved to dismiss the remaining vicarious liability claim against it on the grounds a settlement agreement between Plaintiffs and Defendants extinguished Plaintiffs' claim. *See* R., pp. 1373-74; *see also* R., pp. 1375-85. The next day, Plaintiffs filed their opposition to the motion to dismiss along with a document titled "Release," attached to an affidavit of counsel, in an attempt to avoid dismissal of St. Luke's based upon arguments relating to language contained in the release. *See* R., pp. 1406-14; R., pp. 1388-1389; R., p. 1401. This unilaterally drafted release had been prepared without the input or approval of Defendants and contained language which Defendants did not and could not agree to.

On August 8, 2014, the district court heard oral argument on St. Luke's motion to dismiss and denied the motion, after which it considered the issues regarding the attempted settlement created by the language in the release. Due to the parties' inability to agree to the contents of the release, the court determined no settlement agreement existed and advised that trial would proceed against all parties on the following Monday. *See* Tr., Vol. II, pp. 134-202.

b. Plaintiffs' motion for summary judgment.

On the first day of trial, August 11, 2014, Plaintiffs filed Plaintiffs' Motion for Summary Judgment Re: Settlement and a memorandum and affidavit in support of the same arguing the court should enter summary judgment against Defendants based upon their belief a settlement agreement had been reached. *See* R, pp. 1459-60; R., pp. 1461-67; R. pp. 1451-58. The Court correctly declined to hear argument on the motion at that late date. *See* Tr., Vol. II, pp. 203-04.

Plaintiffs renewed their motion on August 14, 2015, and although the court could not hear the motion that day, the court stated it would allow Plaintiffs to argue their motion the following day so the parties' arguments would not be as limited by time and there would be an adequate record of the same. *See* Tr., Vol. II, p. 317, LL. 7-25.[5] Plaintiffs failed to argue their motion for summary judgment as the court permitted on August 15, 2015, or any day thereafter.

3. <u>Objections To Defense Proceedings</u>.

a. Plaintiffs' motion in limine regarding limiting defendants' experts.

On July 2, 2014, Plaintiffs filed a motion in limine seeking to preclude Defendants from offering both Dr. Rosen and Dr. Moorhead as standard of care experts at trial pursuant to Idaho Rule of Evidence 403 ("Rule 403"). *See* R., p. 1137-1139; R., p. 1143. In opposition, Defendants noted the court had the discretion to limit the number of expert witnesses and argued Dr. Rosen's testimony and Dr. Moorhead's testimony was not cumulative and was provided from unique backgrounds and perspectives for distinct purposes. *See* R., pp. 1292-94. Defendants produced Dr. Rosen's and Dr. Moorhead's expert disclosures and deposition

[5] "Vol. II" refers to the transcript on appeal of the remaining pretrial motions and trial.

transcripts to ensure the court was aware of their anticipated testimony and to illustrate their unique qualifications and views. *See* R., pp. 1223-87. On July 16, 2014, the district court agreed with Defendants and appropriately denied Plaintiffs' motion in limine on this issue at that time. *See* Tr., Vol. II, p. 106, LL. 5-25–p. 107, LL. 1-7.

b. Plaintiff's motion for limitation of defense proceedings.

On August 11, 2014, Plaintiffs filed their Motion for Limitation of Defense Proceedings asking the court to limit the involvement of both defense counsel.[6] *See* R., p. 1468-70. The court denied the motion. *See* Tr., Vol. II, p. 218, LL 17-25–p. 220, LL. 1-5.

c. Plaintiffs' motions for mistrial.

On August 13, 2014, Plaintiffs moved for a mistrial solely on the ground it was purportedly unfair for the court to entertain two sets of defense lawyers. The district court denied the motion. *See* Tr., Vol. II, p. 227, LL. 10-20. The next day, Plaintiffs again moved for a mistrial on the same grounds. The district court denied the motion, although the court indicated it may require the parties to share the time for closing argument. *See* Tr., Vol. II, p. 313, LL. 18-25 – p. 316, L. 22. Then, on August 15, 2015, Plaintiffs moved for a mistrial again, but did not set forth the basis of the motion. However, it was apparent the motion was predicated upon the same basis Plaintiffs had previously argued, and the district court denied the same accordingly. *See* Tr., Vol. II, p. 652, LL. 12-17.

4. <u>Rebuttal Witnesses</u>.

a. Plaintiffs' attempt to replace Dr. West with Dr. Torres.

[6] In Appellants' Brief, Plaintiffs refer to this document as their "Objection to Defense Proceedings." *See* Appellants' Brief, p. 36.

Over one month after Plaintiffs' rebuttal expert disclosure deadline, Plaintiffs disclosed Hugh West, M.D. as a proposed expert on the standard of care and causation. On July 3, 2014, Defendants moved to strike Plaintiffs' untimely expert disclosure of Dr. West. *See* R., pp. 1171-73; R., pp. 1174-87. In response, Plaintiffs moved for an extension of time to disclose rebuttal experts. *See* R., p. 14. The district court granted Plaintiffs' request for an extension but determined Dr. West would be limited to rebuttal testimony and not allowed in their case in chief. *See* Tr., Vol. II, p. 103, LL. 5-9.

On Monday, August 25, 2014, Plaintiffs' counsel advised Dr. West was not available to testify that day, even though he had previously indicated Dr. West would be available that day and the previous week the court ruled Dr. West could testify that day during Respondents' case in chief due to his later unavailability. *See* Tr., Vol. II, p. 1453, LL. 11-25–p. 1445, LL. 1-14. Plaintiffs then sought to use Dr. Torres as an alternative rebuttal witness by reading portions of his deposition testimony into the record. *See* Tr., Vol. II, p. 1454, LL. 1-13. The district court denied Plaintiffs' request to read portions of Dr. Torres' deposition transcript into the record.[7] *See* Tr., Vol. II, pp. 1455, LL. 22-25–p. 1458, LL. 1-2.

b. Dr. Worst.

Richard Worst,[8] M.D., a psychiatrist, was retained by Defendants to conduct an independent medical exam of K.M., the [redacted] of the decedent, and to evaluate her prior mental health treatment, psychological condition, prognosis, and potential future costs for her

[7] The court had previously ruled Plaintiffs would not be permitted to read excerpts from Dr. Torres' deposition because, in part, Dr. Torres was either not a relevant fact witness or he was being offered for expert testimony when he had not been previously disclosed as an expert. *See* Tr., Vol. II, pp. 875-76, LL. 1-22.
[8] Plaintiffs repeatedly refer to Dr. Worst as "Dr. Wurst." The correct spelling for his name is Dr. Worst.

psychological care and treatment. Dr. Worst conducted his independent medical examination of K.M. and prepared a written evaluation.

In their motions in limine, Defendants sought to preclude Plaintiffs from presenting evidence or testimony regarding K.M.'s alleged conditions following her father's death because Plaintiffs had not disclosed any expert testimony to establish those conditions or any alleged damages were caused by negligence on the part of Defendants. *See* R., pp. 1168-1169. The district court granted the motion in limine prohibiting Plaintiffs from presenting evidence as to K.M. due to their lack of admissible expert testimony.[9] *See* Tr., Vol. II, p. 88, LL. 6-7. During the hearing on the motion, Plaintiffs attempted to rely upon Dr. Worst's opinions and indicated they anticipated utilizing Dr. Worst's opinions in their case-in-chief to try to establish K.M.'s conditions were caused by the decedent's death. *See generally*, Tr., Vol. II, p. 83, LL. 14-25.

Since Plaintiffs had not previously disclosed any expert to address those issues, let alone Defendants' own expert Dr. Worst, Defendants requested the court preclude Plaintiffs from attempting to offer Dr. Worst as an expert in their case-in-chief. *See* Tr., Vol. II, p. 85, LL. 4-25 –p. 86, LL. 1-3. The district court ruled it was not inclined to allow Dr. Worst to opine in Plaintiffs' case-in-chief where he had not been properly disclosed.[10] *See* Tr., Vol. II, p. 86, LL. 5-15. Thereafter, Plaintiffs supplemented their expert disclosures to include Dr. Worst. *See* R., pp. 1130-1131. As it was clear Plaintiffs would continue to attempt to use Dr. Worst's testimony

[9] Plaintiffs have not alleged the district court erred in granting this motion in limine on appeal.
[10] Despite Plaintiffs' untimely disclosure, the court determined Dr. Worst would be allowed to testify as a rebuttal witness at trial. *See* Tr., Vol. II, p. 102, LL. 1-14.

in their case-in-chief despite the court's prior rulings, Defendants were forced to seek further relief from the court.

Defendants then filed their Second Set of Motions in Limine, which sought, in part, to preclude Plaintiffs from relying upon Dr. Worst in their case-in-chief by eliciting his testimony and/or seeking to introduce his report.[11] *See* R., p. 20; *see also* Tr., Vol. II, p. 204, LL. 13-16; Tr., Vol. II, p. 208, LL. 3-25–p. 209, LL. 1-8. This motion in limine was based upon Defendants' contention that Plaintiffs had violated the court's order at the hearing on July 21, 2014, on Defendants' motion for a protective order regarding Dr. Worst's deposition.

On the first day of trial, the court considered Defendants' Second Set of Motions in Limine and held Dr. Worst would not be permitted to opine in Plaintiffs' case-in-chief. *See* Tr., Vol. II, p. 208, LL. 3-12. In doing so, the court reaffirmed its prior decision regarding Dr. Worst. Thereafter, Plaintiffs did not attempt to introduce Dr. Worst in their case-in-chief or as a rebuttal witness. Plaintiffs did not make an offer of proof at trial regarding what testimony Dr. Worst would have offered in their case-in-chief or rebuttal.

C. Statement Of Facts.

Mitchell Morrison presented to the St. Luke's Meridian Medical Center Emergency Department on December 26, 2011, with a complaint of non-traumatic chest pain. Mr. Morrison was treated by Dr. Franklin, a board certified emergency physician. *See* Tr., Vol. II, p. 890, LL. 16-19; Tr., Vol. II, p. 901, LL. 22-24. Chest pain is a common complaint in the emergency room

[11] The second set of motions in limine was renewed on August 8, 2014. *See* R., pp. 1444-1446.

and may be caused by numerous, non-coronary related issues. *See* Tr., Vol. II, pp. 1367, LL. 16-25 – p. 68, LL. 1-3.[12]

Dr. Franklin took a proper, detailed history and conducted a thorough physical of Mr. Morrison. *See* Tr., Vol. II, p. 904, LL. 3-9; *see also* Tr., Vol. II, pp. 937-38; Tr., Vol. II, p. 1376, LL. 14-19; *see also* Tr., Vol. II, p. 1531, LL. 16-25–p. 1532, LL. 1-15. Dr. Franklin also ordered appropriate tests, including an electrocardiogram, chest x-ray, and laboratory tests to evaluate Mr. Morrison's condition. *See* Tr., Vol. II, p. 1377, LL. 2-8; Tr., Vol. II, p. 1533, LL. 3-9.

Based upon the history, physical examination, and the results of testing, including a normal electrocardiogram[13] and non-elevated cardiac enzymes, Dr. Franklin correctly determined Mr. Morrison was not having a heart attack. *See* Tr., Vol. II, p. 944, LL. 11-18; *see also* Tr., Vol. II, p. 399, LL. 2-5. Given the tests results, symptoms, and reported history, Mr. Morrison did not meet the criteria for placement in the chest pain center, which is comprised of designated beds within the emergency department for patients who need additional observation time for elevated enzymes. *See* Tr., Vol. II, p. 941, LL. 24-25 – p. 943, LL. 1-24.

Following his work-up Dr. Franklin determined Mr. Morrison was stable and safe for discharge from the emergency department. He was not actively having chest pain, was not short of breath, his electrocardiogram did not reflect any active cardiac problems, there were no signs of an acute heart attack, and his profile was lower-risk. *See* Tr., Vol. II, p. 947, LL. 14-24-p. 948,

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[12] In fact, in the prior five years, approximately 98% of patients who present to the emergency department with chest pain who go through a workup and follow-up are not diagnosed with coronary artery disease. *See* Tr., Vol. II, p. 1471, LL. 2-10.

[13] The electrocardiogram, or EKG, was normal in the sense it did not reflect any active cardiac problems. *See* Tr., Vol. II, pp. 956-57.

LL. 1-6; *see also* Tr., Vol. II, p. 401, LL. 10-15; Tr., Vol. II, p. 1377, LL. 18-22; Tr., Vol. II, p. 1540, LL. 2-3. However, Dr. Franklin determined prompt follow-up with a cardiologist was appropriate and recommended the same. *See* Tr., Vol. II, p. 914, LL. 14-22; *see also* Tr., Vol. II, p. 934, LL. 5-25; *see also* Tr., Vol. II, p. 366, LL. 20-25; Tr., Vol. II, p. 367, LL. 1-4; Tr., Vol. II, p. 1377, LL. 9-17.

Prior to discharge Dr. Franklin instructed Mr. Morrison to call the cardiologist the next morning to schedule an appointment. *See* Tr., Vol. II, p. 915, LL. 7-10; *see also* Tr., Vol. II, p. 907, LL. 16-25. In addition to the early follow-up with a cardiologist, Dr. Franklin also referred Mr. Morrison to his primary care physician, Dr. Hale. *See* Tr., Vol. II, p. 932, LL. 19-24. Dr. Franklin included these recommendations in discharge instructions, which were provided to Mr. Morrison. *See* Tr., Vol. II, p. 916, LL. 13-18; *see also* Tr., Vol. II, p. 1065, LL. 2-5.

Dr. Franklin had previously referred more than one thousand patients with complaints of chest pain to cardiologists for follow-up testing, and the patients had received follow-up in a timely manner. *See* Tr., Vol. II, p. 929, LL. 16-25; *see also* Tr., Vol. II, p. 948, LL. 15-24. In his experience, such patients had been scheduled with the cardiologist within one week. Dr. Franklin's experience was consistent with St. Luke's goal, which was to schedule first-time cardiac patients with a cardiologist within one week. *See* Tr., Vol. II, p. 930, LL. 1-12; *see also* Tr., Vol. II, p. 256, LL. 10-20.

Preeminent experts in emergency medicine testified Dr. Franklin's referral and discharge instructions complied with the applicable standard of health care practice. Dr. Moorhead, a board certified emergency physician who served as president of the American Board of

Emergency Medicine, testified the discharge instructions complied with the applicable standard of care, as did Dr. Rosen, a distinguished board certified emergency physician. *See* Tr., Vol. II, p. 1357, LL. 7-16; Tr., Vol. II, p. 1377, LL. 9-17; Tr., Vol. II, p. 1541, LL. 20-25 – p. 1543, LL. 1-2. Dr. Codina, a local board certified cardiologist, confirmed it was appropriate for Dr. Franklin to discharge Mr. Morrison with instructions to call to schedule an appointment with a cardiologist in the morning. *See* Tr., Vol. II, p. 1270, LL. 21-25 – p. 1271, L. 1; *see also* Tr., Vol. II, p. 1295, LL. 7-25 – p. 1296, LL. 1-2.

Mrs. Morrison called the cardiologist for an appointment for Mr. Morrison the next morning, as instructed. *See* Tr., Vol. II, p. 1004, LL. 19-21. Following attempts to schedule an earlier appointment, she accepted an appointment for approximately three weeks later. *See* Tr., Vol. II, p. 1011, LL. 14-15. Mr. Morrison did not schedule an appointment with Dr. Hale, Mr. Morrison's primary care provider, as instructed. *See* Tr., Vol. II, p. 1063, LL. 13-22.[14] Mr. Morrison passed away on January 11, 2012, prior to his appointment with a cardiologist. The cause of death was attributed to coronary artery disease with acute thrombosis. *See* R., p. 880.

II.
ISSUES ON APPEAL

1. Whether the district court abused its discretion in finding that Plaintiffs' standard of health care practice expert, Dr. MacQuarrie, failed to satisfy the foundational requirements of Idaho Code § 6-1012 and § 6-1013.
2. Whether the district court abused its discretion with respect to its decisions relating to the alleged settlement.
3. Whether the district court abused its discretion in denying Plaintiffs' objections relating to defense proceedings.

[14] The emergency department had faxed records to Dr. Hale on December 27, 2011. *See* Tr., Vol. II, p. 1168, LL. 1-16. Dr. Hale's medical assistant left a message with Mr. Morrison to arrange a follow-up appointment for chest pain, but Mr. Morrison did not schedule an appointment. *See* Tr., Vol. II, p. 1169, LL. 6-25 – p. 1170, LL. 1-7.

4. Whether the district court abused its discretion in denying Plaintiffs' request to replace Dr. West's expert rebuttal testimony by reading portions of Dr. Torres' deposition.
5. Whether Defendants are entitled to attorney's fees and costs on appeal pursuant to Idaho Code § 12-121 and Idaho Appellate Rules 40 (a) and 41.

III.
STANDARDS OF REVIEW

A. Standard Of Review For Emergency Medicine Of Idaho's Motion For Partial Summary Judgment.

"'On appeal from the grant of a motion for summary judgment, this Court utilizes the same standard of review used by the district court originally ruling on the motion.'" *Mattox v. Life Care Centers of Am., Inc.*, 157 Idaho 468, 472, 337 P.3d 627, 631 (2014) (quoting *Arregui v. Gallegos–Main*, 153 Idaho 801, 804, 291 P.3d 1000, 1003 (2012). Summary judgment is appropriate if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Arregui*, 153 Idaho at 804, 291 P.3d at 1003; I.R.C.P. 56(c)).

"'The admissibility of expert testimony, however, is a threshold matter that is distinct from whether the testimony raises genuine issues of material fact sufficient to preclude summary judgment.'" *Mattox*, 157 Idaho at 473, 337 P.3d at 632 (citing *Arregui*, 153 Idaho at 804, 291 P.3d at 1003). With respect to the threshold issue of admissibility, the liberal construction and reasonable inferences standard does not apply. *Id.* (citing *Dulaney v. St. Alphonsus Reg'l Med. Ctr.*, 137 Idaho 160, 163, 45 P.3d 816, 819 (2002)). Instead, the trial court must look at the witness' affidavit or deposition testimony and determine whether it alleges facts which, if taken

as true, would render the testimony of that witness admissible. *Id.* As such, this Court must initially review the district court's ruling on the admissibility of the affidavit of Plaintiffs' expert for an abuse of discretion.

"'A district court's evidentiary rulings will not be disturbed by this Court unless there has been a clear abuse of discretion.'" *Id.* (quoting *McDaniel v. Inland Nw. Renal Care Grp.-Idaho, LLC,* 144 Idaho 219, 222, 159 P.3d 856, 859 (2007)). In applying the abuse of discretion standard, this Court considers three questions: "(1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason." *Id.* (quoting *McDaniel*, 144 Idaho at 221–22, 159 P.3d at 858–59). Thus, absent a showing of abuse of discretion, the district court's ruling precluding Plaintiffs' expert's affidavit should be upheld and the partial summary judgment should stand.

B. Abuse Of Discretion Standard Of Remaining Issues Raised By Appellants' Opening Brief.

The remaining issues raised in Appellants' brief, including decisions on motions in limine,[15] admitting or precluding expert testimony,[16] exclusion or admission of evidence in rebuttal,[17] number of expert witnesses allowed to testify,[18] delineation of issues for trial,[19]

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[15] *See Cramer v. Slater*, 146 Idaho 868, 878, 204 P.3d 508, 518 (2009).
[16] *See Morgan v. New Sweden Irr. Dist.*, 156 Idaho 247, 258, 322 P.3d 980, 991 (2014).
[17] *See Van Brunt v. Stoddard*, 136 Idaho 681, 686, 39 P.3d 621, 626 (2001).
[18] *See Edmunds v. Kraner*, 142 Idaho 867, 877, 136 P.3d 338, 348 (2006).
[19] *Id.*

sanctions for violations of pretrial orders and discovery,[20] and motions for mistrials,[21] are all reviewed under an abuse of discretion standard, which is set forth above, and will not be overturned except upon a showing of abuse of discretion.

Plaintiffs generally take issue with various evidentiary rulings by the trial court. "This Court disregards errors made on evidentiary rulings unless the rulings were a manifest abuse of the trial court's discretion and affected the party's substantial rights." *H.F.L.P., LLC v. City of Twin Falls*, 157 Idaho 672, 686, 339 P.3d 557, 571 (2014) (citing *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 51, 995 P.2d 816, 821 (2000)). "Indeed, I.R.E. 103(a) provides that '[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected.'" *Id.* "Similarly, I.R.C.P. 61 provides that '[t]he court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.'" *Id.* (quoting I.R.C.P. 61). "Furthermore, issues on appeal are not considered unless they are properly supported by both authority and argument." *Id.* (citing *Gem State Ins. Co. v. Hutchison,* 145 Idaho 10, 16, 175 P.3d 172, 178 (2007)). "Because an appellant can only prevail if the claimed error affected a substantial right, the appellant must present some argument that a substantial right was implicated." *Id.* (citing *Hurtado v. Land O'Lakes, Inc.,* 153 Idaho 13, 18, 278 P.3d 415, 420 (2012). "Thus, 'when appealing from an evidentiary ruling reviewed for abuse of discretion, the appellant must demonstrate *both* the trial court's abuse of discretion and that the error affected a substantial

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[20] *See, e.g., Priest v. Landon*, 135 Idaho 898, 900, 26 P.3d 1235, 1237 (Ct. App. 2001) ("The imposition of such sanctions is committed to the discretion of the trial court, and we will not overturn such a decision absent a manifest abuse of that discretion.")

[21] *See Weinstein v. Prudential Property and Cas. Ins. Co.*, 149 Idaho 299, 312, 233 P.3d 1221, 1234 (2010).

right.'" *Id.* (emphasis in original). "This Court has held that a party's failure to present some argument as to how the evidentiary ruling affected a substantial right is fatal to its evidentiary challenge and the Court deems the issue waived." *Id.*

IV.
ARGUMENT

A. The District Court Properly Granted Defendants' Motion For Partial Summary Judgment.

The district court's decision granting partial summary judgment to Emergency Medicine of Idaho on Plaintiffs' claim of direct negligence should be upheld because Plaintiffs failed to present admissible expert testimony sufficient to establish a genuine issue of material fact regarding whether the Emergency Medicine of Idaho entity breached the applicable standard of health care practice. *See* R., pp. 1327-35.

Plaintiffs only offered an affidavit by Dr. MacQuarrie regarding the standard of care as to Emergency Medicine of Idaho, which the court rightfully within its discretion struck, because Plaintiffs failed to establish the foundation required by Idaho Code § 6-1012 and § 6-1013 for his opinions. The trial court found Plaintiffs failed to demonstrate Dr. MacQuarrie possessed familiarity with the applicable community standard of care for Emergency Medicine of Idaho, separate and apart from Dr. Franklin, or to establish the community standard of care for the entity had been replaced by a national standard of care. *See* R., pp. 1327-35. Since the court acted within its discretion in striking Dr. MacQuarrie's affidavit, the court appropriately found Plaintiffs failed to present a genuine issue of material fact on the standard of care, a necessary

element of Plaintiffs' claim, and granted partial summary judgment. Therefore, this Court should uphold the district court's decision granting Defendants' partial summary judgment.

In order to show the trial court erred in finding Dr. MacQuarrie's testimony inadmissible, Plaintiffs would have to establish the court committed a clear abuse of its discretion. *See Mattox*, 157 Idaho at 473, 337 P.3d at 632. Plaintiffs have not and cannot show the district court committed a clear abuse of its discretion because the trial court correctly perceived the issue as one of discretion,[22] acted within the boundaries of its discretion and consistently with applicable legal standards; and reached its decision through an exercise of reason as set forth below.

To avoid summary judgment in a medical malpractice case, Plaintiffs must offer admissible expert testimony establishing that the defendant provider negligently failed to meet the applicable standard of health care practice. *See Dulaney,* 137 Idaho at 164, 45 P.3d at 820. In order to present such testimony, plaintiffs in a medical malpractice action must establish that their standard of care expert is familiar with the applicable community standard of health care practice pursuant to Idaho Code § 6-1012 and § 6-1013.

"Idaho Code Section 6–1012 requires a plaintiff bringing a medical malpractice claim to prove by direct expert testimony that the defendant negligently failed to meet the applicable standard of health care practice." *Mattox*, 157 Idaho at 473, 337 P.3d at 632. "That standard is specific to 'the time and place of the alleged negligence' and 'the class of health care provider that such defendant then and there belonged to. . . .'" *Id.* (quoting I.C. § 6-1012). "The defendant's care is judged against 'similarly trained and qualified providers of the same class in

[22] *See* R., p. 1330.

the same community, taking into account his or her training, experience, and fields of medical specialization, if any.'" *Id.* (quoting I.C. § 6-1012).

Idaho Code § 6-1013 governs the manner in which the expert standard of care testimony required by Idaho Code § 6-1012 must be offered. In order to offer such testimony, plaintiffs must lay proper foundation by establishing the following:

> (a) that such an opinion is actually held by the expert witness, (b) that the said opinion can be testified to with reasonable medical certainty, and (c) that such expert witness possesses professional knowledge and expertise coupled with actual knowledge of the applicable said community standard to which his or her expert testimony is addressed. . . .

I.C. § 6–1013 (emphasis added); *see also Mattox*, 157 Idaho at 473, 337 P.3d at 632.

In addition to having to lay the foundation required by Idaho Code § 6-1012 and § 6-1013 to present expert testimony in opposition to a motion for summary judgment, Plaintiffs must also comply with Idaho Rule of Civil Procedure 56(e) ("Rule 56(e)"). *See Mattox*, 337 P.3d at 632. Pursuant to Rule 56(e), the party offering an expert's affidavit on the standard of care "must show that the facts set forth therein are admissible, that the witness is competent to testify regarding the subject of the testimony, and that the testimony is based on personal knowledge." *Id.* (citing *Dulaney*, 137 Idaho at 164, 45 P.3d at 820). "Statements that are conclusory or speculative do not satisfy either the requirement of admissibility or competency under Rule 56(e)." *Id.* (quoting *Dulaney*, 137 Idaho at 164, 45 P.3d at 820). "As a result, '[a]n expert testifying as to the standard of care in medical malpractice actions must show that he or she is familiar with the standard of care for the particular health care professional for the relevant

community and time" and "how he or she became familiar with that standard of care.'" *Id.* (quoting *Dulaney*, 137 Idaho at 164, 45 P.3d at 820).

To determine whether a standard of care expert's affidavit satisfies the requirements of Idaho Code § 6-1012, § 6-1013, and Rule 56(e), the guiding question is "whether the affidavit alleges facts which, taken as true, show the proposed expert has actual knowledge of the applicable standard of care." *Id.* at 474, 337 P.2d at 633. "In addressing that question, courts must look to the standard of care at issue, the proposed expert's grounds for claiming knowledge of that standard, and determine—employing a measure of common sense—whether those grounds would likely give rise to knowledge of that standard." *Id.*

In this case, the evidence offered by Plaintiffs in an attempt to avoid summary judgment on Plaintiffs' direct negligence claim against Emergency Medicine of Idaho did not satisfy the requirements of Idaho Code § 6-1012, § 6-1013, and Rule 56(e). Plaintiffs offered Dr. MacQuarrie's deposition,[23] his expert disclosure,[24] and an affidavit from Dr. MacQuarrie.[25] Plaintiffs also offered other depositions and documents in an attempt to establish foundation for Dr. MacQuarrie's standard of care opinions. *See, e.g.*, R., pp. 712-967. The district court reviewed the purported bases for Dr. MacQuarrie's foundation, including his conversation with emergency physician, Dr. Kim, and his review of the deposition transcripts of Dr. Franklin and Emergency Medicine of Idaho's president, Dr. Soni, and properly rejected them.

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[23] R., p. 807-27.
[24] R., p. 791-98.
[25] R., p. 1038-49.

First, the court appropriately found Dr. MacQuarrie's discussions with Dr. Kim, as set forth in Dr. MacQuarrie's affidavit and deposition, were insufficient to establish actual knowledge of the applicable standard of health care practice for emergency group entities. *See* R., p. 1333. Although an out-of-area expert may familiarize himself with the community standard of health care practice through consultation with a local specialist, the out-of-area expert must show the local specialist is familiar with the community standard of care and must state how the local expert became familiar with the community standard of care. *Bybee v. Gorman*, 157 Idaho 169, 178, 335 P.3d 14, 23 (2014); *see also Hall v. Rocky Mountain Emergency Physicians, LLC*, 155 Idaho 322, 328, 312 P.3d 313, 319 (2013) (consulting specialist must be sufficiently familiar with the defendant's specialty); *Suhadolnik v. Pressman*, 151 Idaho 110, 116, 254 P.3d 11, 17 (2011). Here, neither Dr. MacQuarrie's affidavit nor his deposition testimony showed Dr. Kim was familiar with the applicable community standard of care or how Dr. Kim became familiar with said standard for an emergency group entity.

With respect to Dr. MacQuarrie's affidavit, the court properly found it provided no substance of his conversations with Dr. Kim regarding an emergency physician group. *See* R., p. 1333. Dr. MacQuarrie merely stated, "This is based on my conversations with Dr. Kim who was an employee of a group providing emergency department services at St. Alphonsus Regional Medical Center in 2011 . . . ." *See* R., p. 1041. This brief, conclusory reference to Dr. MacQuarrie's conversations with Dr. Kim was insufficient to show Dr. Kim himself possessed actual knowledge of the standard of care applicable to an emergency group, as opposed to an

emergency physician, with respect to requirements for the entity relating to the referral process from an emergency department in Meridian, Idaho, to a specialist in December 2011.

As for Dr. MacQuarrie's deposition testimony regarding Dr. Kim, the court correctly recognized this testimony also did not discuss the standard of care for the question at issue. *See* R., p. 1333. The conversation with Dr. Kim was directed at the standard of care applicable to emergency medicine physicians, individually, not a group. *See* R., p. 811. Even with respect to individual physicians, Dr. MacQuarrie and Dr. Kim did not discuss referrals to specialists or details regarding what information should be included in discharge instructions. *See* R., p. 814. Dr. MacQuarrie only discussed standards relating to chest pain workup, not the standards Dr. MacQuarrie attributed to emergency group entities for referrals. *See* R., pp. 813-14. As a result, the district court correctly found the conversation did not specifically address the standard of care for the Emergency Medicine of Idaho entity. *See* R., p. 1333.

Next, the court properly determined Dr. Soni's and Dr. Franklin's deposition transcripts were not sufficient to confer actual knowledge of the applicable standard of care because neither witness articulated any community standard of care for physician group entities, as opposed to emergency physicians individually. Although it may be acceptable for an expert to demonstrate knowledge of the community standard of care by reviewing deposition testimony, that testimony must clearly articulate the community standard for the particular time, place and specialty at issue in order to meet the foundational requirements of Idaho Code § 6–1013. *See Suhadolnik*, 151 Idaho at 118, 254 P.3d at 19. Dr. Soni's and Dr. Franklin's deposition testimony did not

clearly articulate the community standard of care for an emergency physician group entity but instead discussed the standards of care for emergency medicine physicians, not entities.

On appeal, Plaintiffs point to nothing in Dr. Soni's or Dr. Franklin's deposition transcripts which is specific to Emergency Medicine of Idaho; rather, Plaintiffs only point to examples of where they discussed the standards relating to the individual emergency medicine physicians. *See, e.g.,* Appellants' Brief, pp. 12-13, 15. Contrary to Plaintiffs' assertions, [26] neither Dr. Soni nor Dr. Franklin testified as to any duty of an entity, let alone admitted to the existence of any duty which Plaintiffs' contend was breached by Emergency Medicine of Idaho.

Finally, the district court considered Dr. MacQuarrie's discussion with Dr. Lee, which was disclosed for the first time in Plaintiffs' supplemental affidavit in opposition to the Motion for Partial Summary Judgment, and after the hearing on the same. The court determined the conversation should be stricken from the record and Dr. MacQuarrie could not rely on it because it was untimely and Plaintiffs had failed to properly disclose Dr. MacQuarrie would rely upon a discussion with Dr. Lee as foundation for his standard of care opinions.

The court's decision to strike portions of the affidavit was an appropriate sanction within its discretion. Plaintiffs have a duty pursuant to Idaho Rule of Civil Procedure 33(a)(2) to answer Defendants' interrogatories asking for foundational facts for the opinions which Plaintiffs' expert witnesses hold and a duty to seasonably supplement their answers pursuant to Idaho Rule of Civil Procedure 26(e)(1). *See Clark v. Raty*, 137 Idaho 343, 346, 48 P.3d 672, 675

[26] Plaintiffs claim Dr. Soni admitted the duty of the entity with respect to the referral process, but merely cites to a portion of Dr. Soni's deposition wherein Dr. Soni discussed the process of referrals was a shared responsibility. *See* Appellants' Brief, p. 15. This does not constitute an admission of any duty to take any particular action at issue in this case.

(Idaho App., 2002). If Plaintiffs fail to supplement their discovery responses, the trial court may properly exclude the testimony of the witnesses who were not disclosed in accordance with the rule. *See* I.R.C.P. 26(e)(4). "Typically, failure to meet the requirements of Rule 26 results in exclusion of the proffered evidence." *Radmer v. Ford Motor Company*, 120 Idaho 86, 89-90, 813 P.2d 897, 900-01 (1991); *see also Clark*, 137 Idaho at 347, 38 P.3d at 676. Plaintiffs failed to disclose a conversation with Dr. Lee would serve as a basis for the foundation of Dr. MacQuarrie's opinions at any time prior to the production of his affidavit.

Not only did Plaintiffs fail to timely disclose that Dr. MacQuarrie would rely upon a conversation with Dr. Lee in response to discovery, but the conversation with Dr. Lee occurred after the hearing on the Motion for Partial Summary Judgment in contravention of the court's order permitting Dr. MacQuarrie to submit an affidavit based upon foundation he had for his opinions prior to the hearing. Since the consultation with Dr. Lee did not occur until well after the disclosure deadline and after hearing on the motion for summary judgment, the district court acted within its discretion in striking the portion of Dr. MacQuarrie's affidavit relying upon the untimely conversation with Dr. Lee. *See* R., pp. 1333-34. Without this information in the affidavit, the court concluded the affidavit was inadmissible. *See* R., p. 1334. In light of the analysis the district court undertook, it is clear the district court reached its decision through an exercise of reason. On appeal, Plaintiffs have not met their burden to show otherwise.

Since the district court recognized the issue regarding the admissibility of the testimony was one of discretion, acted within the boundaries of its discretion and consistently with applicable legal standards, and reached its decision through an exercise of reason, the district

court did not abuse its discretion. Without any expert standard of care testimony as to the claim of direct liability against Emergency Medicine of Idaho, the district court's decision granting partial summary judgment to Emergency Medicine of Idaho was clearly proper.

Alternatively, even if this Court were to somehow find the district court abused its discretion in excluding Dr. MacQuarrie's affidavit and finding he lacked the foundation required to opine regarding the standard of care for Emergency Medicine of Idaho itself, any such error was ultimately harmless in this case. The Idaho Supreme Court will not reverse the trial court if an alleged error is harmless. *Taylor* v. *AlA Services Corp.,* 151 Idaho 552, 559, 261 P.3d 829, 836 (2011). "If an error did not affect a party's substantial rights, or if the error did not affect the result of the trial, the error is harmless and not grounds for reversal." *Id.* (citing *Myers* v. *Workmen's Auto Ins. Co.,* 140 Idaho 495, 504, 95 P.3d 977, 986 (2004)); *see also Martin* v. *Hackworth,* 127 Idaho 68, 70, 896 P.2d 976, 978 (1995); *Soria* v. *Sierra Pac. Airlines, Inc.,* 111 Idaho 594, 608, 726 P.2d 706, 718 (1986).

Plaintiffs' direct negligence claim against Emergency Medicine of Idaho was premised upon Plaintiffs' contention that Dr. Franklin breached the standard of care by instructing the decedent to contact a cardiologist the next morning and by not including specific information in the discharge instructions as to when the decedent should be seen by the cardiologist. *See* Appellants' Brief, pp. 16-17. Plaintiffs assert Dr. Franklin's alleged failure "can be traced back to his group which allowed its physicians to proceed in ignorance with respect to the referral system." *See* Appellants' Brief, p. 17. Thus, Plaintiffs claim Dr. Franklin's purported breach of the standard of care was caused by the actions or inactions of Emergency Medicine of Idaho.

However, the jury in this case found Dr. Franklin complied in all respects with the applicable standard of health care practice. *See* R., p. 1563.

The jury determined Dr. Franklin fully complied with the applicable standard of health care practice. Since there was found to be no standard of care violation by Dr. Franklin, Emergency Medicine of Idaho's alleged failures could not have contributed to any breach of the standard of care by Dr. Franklin. As a result, the alleged error did not affect the result of the trial. Therefore, Defendants respectfully submit any error relating to the granting of the motion for partial summary judgment was harmless and does not warrant a remand and/or new trial.

B. The District Court Acted Within Its Discretion With Respect To Its Decisions Relating To The Alleged Settlement.

As an initial matter, in their opening brief Plaintiffs did not explicitly allege the district court erred with respect to any particular decision relating to the alleged settlement. Instead, Plaintiffs discussed carefully selected portions of the settlement negotiations, while omitting material aspects of the same, and set forth an incomplete procedural history of some of the court's decisions relating to these matters. This appears to be an effort to invite this Court to abandon its role as an appellate Court and to step into the role of a trial court, to determine the factual issue of whether or not a settlement agreement had been reached between the parties. This is clearly improper and prohibited by Idaho law. It is well settled within Idaho case law that appellate courts do not sit in the capacity of fact finders. *See, e.g., Barrett v. Barrett*, 149 Idaho 21, 25, 232 P.3d 799, 803 (2010) ("'It is not the function of this Court to make findings of fact.'") (quoting *Walter v. Potlatch Forests, Inc.*, 94 Idaho 738, 740, 497 P.2d 1039, 1041

(1972)); *In re City of Shelley*, 151 Idaho 289, 294, 255 P.3d 1175, 1180 (2011) ("Because this Court is sitting in an appellate capacity, as was the district court, we are bound to consider only the record and cannot find facts during our inquiry into whether we have jurisdiction to review Shelley's annexation."); *Sparkman v. Miller-Cahoon Co.*, 48 Idaho 254, 282 P. 273, 276 (1929) (holding that findings are not within the Court's province).

In addition to not alleging the district court erred with respect to any specific decision, Plaintiffs did not cite any authority to show the court's decisions were erroneous. Accordingly, to the extent Plaintiffs attempt to claim error with respect to the court's decisions regarding the attempted settlement, any claim fails to comply with Idaho Appellate Rule 35(a)(6) and must be disregarded. Additionally, Plaintiffs cannot allege any error for the first time in their reply brief. *See Bell v. Idaho Dept. of Labor*, 157 Idaho 744, 749, 339 P.3d 1148, 1153 (2014).

Out of an abundance of caution, however, Defendants will address the proceedings and the court's decisions which are referenced in Plaintiffs' Brief on this topic, including the hearing on St. Luke's motion to dismiss and the decisions during trial relating to Plaintiffs' motion for summary judgment. A review of the proceedings below shows the district court acted within its discretion on all matters referred or cited to by Plaintiffs and those rulings must be upheld.

Prior to doing so, however, it must also be noted Plaintiffs have attempted to improperly introduce documents for this Court's consideration which are not part of the record. *See* Plaintiffs' Brief, Appendix Ex. A. "This Court is bound by the record on appeal and 'cannot consider matters or materials that are not part of the record or not contained in the record.'" *Kootenai Cty. v. Harriman-Sayler*, 154 Idaho 13, 16, 293 P.3d 637, 640 (2012) (quoting

Chisholm v. Idaho Dep't of Water Res., 142 Idaho 159, 162, 125 P.3d 515, 518 (2005)). "Items attached to a party's opening brief are not part of the record and cannot be considered." *Id.* (citing *McLean v. Cheyovich Family Trust,* 153 Idaho 425, 430–31, 283 P.3d 742, 747–48 (2012); *Goodman Oil Co. v. Scotty's Duro–Bilt Generator, Inc.*, 147 Idaho 56, 59, 205 P.3d 1192, 1195 (2009)). Since the Court is bound by the record and cannot consider matters not part of the record, including documents attached to a party's opening brief, the Court will not address the party's contentions regarding such documents. *See, e.g., State ex rel. Ohman v. Ivan H. Talbot Family Trust*, 120 Idaho 825, 827, 820 P.2d 695, 697 (1991). As such, Plaintiffs' improper Appendix to their opening brief and all arguments based thereon must be disregarded.

1. Hearing regarding St. Luke's motion to dismiss.

On August 4, 2014, Defendants mistakenly believed they had reached a settlement agreement with Plaintiffs. *See* Tr., Vol. II, p. 181, LL. 7-10. The agreement contemplated reducing the terms to writing in a release and settlement agreement to be prepared by Defendants. *See* Tr., Vol. II, p. 181, LL. 8-10. On August 7, 2014, after regular business hours, Plaintiffs' counsel faxed a signed "Release," which had been unilaterally prepared by Plaintiffs.[27] The release had not been previously provided to Defendants, and Defendants had not agreed to or approved the language contained therein. Significantly, Defendants did not agree to a new, material term contained in the release. *See* Tr., Vol. II, p. 195, LL. 20-25 – p. 197, LL. 1-11.

Plaintiffs filed the unilaterally prepared release in response to St. Luke's motion to dismiss, which argued a settlement between Plaintiffs and Defendants required dismissal of St.

[27] Defendants' counsel did not receive the release until the morning of August 8, 2014, when preparing to attend the hearing in Boise on the motion to dismiss. *See* Tr., Vol. II, p. 185, LL. 15-20.

Luke's. *See* R., p. 1401; *see also* R., pp. 1375-85. In response to arguments potentially supporting St. Luke's dismissal, Plaintiffs added a material term to the release which Defendants had not and would not agree to. *See* R., p. 1401; *see also* Tr., Vol. II, p. 194, LL. 6-15.

At the hearing on August 8, 2014, Defendants' counsel acknowledged she had believed the parties had reached a settlement agreement with Plaintiffs. *See* Tr., Vol. II, p. 179, LL. 24-25 – p. 180, LL. 1-3. She correctly advised the court the agreement was to be reduced to writing, and informed the court that she had not been consulted or advised of the unilateral release until after it had already been submitted to the court. *See* Tr., Vol. II, p. 181, LL. 7-19. The court ordered the parties to confer during a recess to see if language agreeable to Defendants and Plaintiffs could be reached. *See* Tr., Vol. II, p. 191, L. 25 – p. 193, LL. 1-14. During the recess, Plaintiffs' counsel refused to withdraw or change the material term which had not been previously agreed upon, and Defendants' counsel informed the court of this. *See generally* Tr., Vol. II, p. 195, L. 20 – p. 197, LL. 1-11. Due to the continued disagreement over the language in Plaintiffs' unilaterally prepared release, the court stated it did not sound as though a settlement agreement had been reached and ordered the parties to trial. *See* Tr., Vol. II, p. 198, LL. 9-23.

Plaintiffs have not specifically alleged the district court erred with respect to any of its decisions at the August 8, 2014, hearing, nor have Plaintiffs set forth any argument or authority to show the decisions were in error. As such, Defendants cannot respond to any particular errors. As a general matter, Plaintiffs have not met their burden to establish any error relating to the hearing. However, based upon the record and transcript, Defendants respectfully submit the district court acted fully within the outer bounds of its discretion and did not summarily dismiss

Plaintiffs' contention regarding the attempted settlement agreement. When the court was informed of the disagreement over language in the unilaterally prepared "release," it entertained discussion regarding the attempted settlement, after which it ordered the parties to try to resolve the issue regarding the new language in the release during a recess in the hearing. *See* Tr., Vol. II, p. 193, LL. 7-13. After the parties reported to the court that they were unable to resolve their differences vis-à-vis the release, the court indicated it appeared as there was no settlement agreement and thereafter ordered the parties to trial. See Tr., Vol. II, p. 198, LL. 9-23.

As this Court is aware, settlement agreements must comply with the requirements for contracts. *See generally Lawrence v. Hutchinson*, 146 Idaho 892, 898, 204 P.3d 532, 538 (Idaho App., 2009) (citing *McColm–Traska v. Baker*, 139 Idaho 948, 951, 88 P.3d 767, 770 (2004); *Kohring v. Robertson*, 137 Idaho 94, 99, 44 P.3d 1149, 1154 (2002)). If there is not a meeting of the minds on all essential, material terms, there is no valid settlement agreement. *See id.* (discussing the requirement of a meeting of the minds on all material terms of the agreement).

Here, the trial court correctly entertained argument which explained Defendants and Plaintiffs had engaged in settlement negotiations and that while it initially appeared there was an agreement, when the agreement was attempted to be reduced to writing, there was a material term within the proposed release on which the parties could not agree. *See* Tr., Vol. II, pp. 179-97. The court stated, "And I have seen settlements that turned out not to be settlements for the very reason that real estate deals fall apart and other contractual relationships fall apart, and that is that the people are agreeing, and they think they are agreeing. But when it comes right down to it, they are agreeing to two different things." *See* Tr., Vol. II, p. 182, LL. 16-22. The trial

court had the discretion as to what motions it would entertain at that time. It did not disregard Plaintiffs' claims of a settlement agreement out of hand, but rather allowed the parties time to attempt to resolve the issue and, when that failed, determined it appeared there was no agreement and therefore the trial would proceed, as scheduled. *See* Tr., Vol. II, pp. 193-200. Plaintiffs have cited to no authority suggesting this determination was outside the discretion of the court.[28]

Moreover, Plaintiffs have not and cannot claim the district court erred in excluding any particular evidence relating to an alleged settlement at the hearing because Plaintiffs failed to preserve this issue for appeal. Absent an offer of proof, a claim of error based on the exclusion of evidence cannot be preserved on appeal. *See* I.R.E. 103(a)(2); *State v. Young*, 136 Idaho 113, 120, 29 P.3d 949, 956 (2001), *Morris v. Thomson*, 130 Idaho 138, 143, 937 P.2d 1212, 1217 (1997). Plaintiffs note they attempted to present evidence regarding the attempted settlement and that the court did not consider the same. *See* Appellants' Brief, p. 32. However, Plaintiffs did not present an offer of proof to the court to preserve any error with respect to this. Rather, Plaintiffs only indicated they could provide an exchange of e-mails if the court wished. *See* Tr., Vol. II, p. 187, LL. 8-11. This is insufficient to preserve any alleged errors relating to the failure to consider the same for purposes of appeal.

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[28] While it seems inappropriate and irrelevant to address on appeal, it must be noted Plaintiffs' allegations of unethical or calculated behavior on the part of defense counsel are simply not supported by the record. First, it was defense counsel who raised the issue of the un-approved release with the court. *See* Tr., Vol. II, p. 180, LL. 11-23. The record clearly demonstrates defense counsel believed the attempted settlement could be salvaged by attempting to reach agreed upon language. *See* Tr., Vol. II, p. 189 – p. 190, LL. 1-9. Finally, when this effort failed, defense counsel asked the court to vacate the trial to allow the parties additional time to attempt to resolve the impasse, rather than taking valuable time to do so while still attempting to properly prepare for trial. *See* Tr., Vol. II, p. 198, LL. 24-25 – p. 199, LL. 1-11.

Alternatively, any alleged error with respect to the district court's decisions regarding the alleged settlement would be harmless. The Idaho Supreme Court will not reverse the trial court if an alleged error is harmless. *Taylor,* 151 Idaho at 559, 261 P.3d at 836. "If an error did not affect a party's substantial rights, or if the error did not affect the result of the trial, the error is harmless and not grounds for reversal." *Id.* The Plaintiffs wished to present evidence which they believed demonstrated a settlement agreement, in connection with their motion for summary judgment, discussed below, and the court permitted Plaintiffs to argue this motion on August 15, 2014. *See* Tr., Vol. II, p. 317, LL. 15-19. However, Plaintiffs then elected not to argue their motion. Since Plaintiffs were given the opportunity to have the court consider all of the evidence they thought supported the settlement agreement and elected not to do so, they waived this issue and cannot demonstrate they were prejudiced, that any substantial right was affected, or that the result of trial was affected by the court's decisions.

2. Plaintiffs' motion for summary judgment.

The district court acted within its discretion when it initially declined to hear Plaintiffs' Motion for Summary Judgment Re: Settlement, which was filed on the first day of trial, August 11, 2014. *See* Tr., Vol. II, p. 203, L. 25 - p. 204, LL. 1-8; *see also* R, pp. 1459-60; R., pp. 1461-67; R. pp. 1451-58. The court's decision to decline to hear the Motion for Summary Judgment on the same day it was filed and the first day of trial is undisputedly permitted by both the Idaho Rule of Civil Procedure 56(a) and the court's scheduling order. *See* I.R.C.P. 56(a) (requiring claimant to bring a motion for summary judgment at least 90 days before trial or within 7 days from the date of the order setting the case for trial, whichever is later, unless otherwise ordered

by the court). Since Plaintiffs' motion was untimely under Rule 56(a) and the court's scheduling order, the court acted within its discretion in declining to hear the Motion for Summary Judgment on that day.

Alternatively, even if a decision declining to hear a motion for summary judgment on the first day of trial and on the same day it was filed could be construed as error, any such error would be harmless because the court ultimately permitted Plaintiffs to argue the motion. On August 14, 2014, Plaintiffs again asked the court to hear their Motion for Summary Judgment. The court agreed to allow Plaintiffs to argue their motion the following day, to ensure the parties' arguments were not limited by the court's schedule and to permit the parties to make an adequate record. *See* Tr., Vol. II, p. 317, LL. 15-18; *see also* Tr., Vol. II, p. 317, LL. 20-25. Plaintiffs chose not to argue their motion for summary judgment as the court permitted on August 15, 2015, or any day thereafter. Since the record clearly shows the court allowed Plaintiffs to argue their motion and Plaintiffs chose not to do so, the court's initial decision was harmless. Thus, the district court's decision should not be overturned.

C. The District Court Acted Within Its Discretion In Denying Plaintiffs' Objections Relating To Defense Proceedings.

The district court acted within its discretion with respect to the objections to defense proceedings, including the denial of Plaintiffs' motion in limine to preclude the testimony of Dr. Rosen and Dr. Moorhead, Plaintiffs' Motion for Limitation of Defense Proceedings, and Plaintiffs' motions for mistrial. A review of these decisions shows the court acted within its discretion. Additionally, Plaintiffs have not shown any of the decisions affected a substantial

right. Finally, Plaintiffs have not shown any alleged error was anything other than harmless. Plaintiffs have not shown the alleged duplication actually affected the jury's decision. There is nothing in Plaintiffs' briefing, other than unsupported assertions, to demonstrate the jury would have reached a different result. Thus, the district court's decisions must be upheld.

1. Plaintiffs' motion in limine to preclude Defendants from calling Dr. Rosen and Dr. Moorhead.

Whether to grant a motion in limine is a matter within the discretion of the trial court. *See Cramer*, 146 Idaho at 878, 204 P.3d at 518. When presented with a motion in limine, the trial court has the authority to deny the motion and wait until trial to determine if the evidence should or should not be excluded. *Kirk v. Ford Motor Co.*, 141 Idaho 697, 701, 116 P.3d 27, 31 (2005); *see also Gunter v. Murphy's Lounge, LLC*, 141 Idaho 16, 25, 105 P.3d 676, 685 (2005).

Trial courts are vested with the discretion to limit the number of expert witnesses allowed to testify where such limitations are warranted. *See Edmunds*, 142 Idaho at 877, 136 P.3d at 348 (citing *Hansen v. Universal Health Servs. of Nevada, Inc.*, 115 Nev. 24, 974 P.2d 1158, 1161 (1999). "Idaho courts have the inherent authority to delineate issues for trial and indicate the expert witness or witnesses allowed to testify to each relevant issue during the discovery phase of litigation." *Id.*

Plaintiffs filed a motion in limine seeking to preclude Defendants from offering both Dr. Rosen and Dr. Moorhead as standard of care experts pursuant to Idaho Rule of Evidence 403 ("Rule 403"). *See* R., p. 1138; R., p. 1143. In opposition, Defendants argued Dr. Rosen's and Dr. Moorhead's testimony was not cumulative and was provided from unique backgrounds and

perspectives. *See* R., pp. 1292-94. Defendants produced Dr. Rosen's and Dr. Moorhead's expert disclosures and their deposition transcripts to illustrate their anticipated testimony and their unique qualifications. *See* R., pp. 1223-87.

At the hearing, the court advised the parties it had considered the briefs and requested any additional argument, but Plaintiffs did not have anything to add. *See* Tr., Vol. II, p. 106, LL. 5-25 – p. 107, LL. 1-7. Based upon the parties' briefing, the court provided the following evaluation and decision:

> EMI is no longer a defendant, or at least they are not a defendant to the extent that their individual negligence is in question. But -- and it may well be that there comes a time where the presentation of duplicative expert testimony would require the court to step in. There is a point at which courts will step in and prevent the presentation of duplicative testimony. I don't know where that threshold is, but it's not met with two witnesses. If the defense wants to call two witnesses on the issue of liability, I will let the defense call two witnesses on the issue of liability, Mr. Lojek. If they duplicate themselves, I guess we will deal with it. But I'll wait and see what happens at trial, but I'm not going to prohibit them from calling – picking which of these two experts they would rather have testify.

Tr., Vol. II, pp. 106-07.

Given this ruling, it is clear the court denied Plaintiffs' request to limit those experts at that time, but reserved the right to step in and prevent duplicative testimony at trial. *See* Tr., Vol. II, p. 106, LL. 5-25 – p. 107, LL. 1-7. This was not a conclusory and categorical ruling, as Plaintiffs contend, that Defendants would be entitled to call as many experts as they wanted regardless of whether their testimony was duplicative. *Compare* Appellants' Brief, p. 38 to Tr., Vol. II, p. 106, LL. 5-25 – p. 107, LL. 1-7. Rather, the ruling demonstrates the court recognized

it had the authority to prevent cumulative testimony and would do so if necessary, at trial. This ruling was well within the Court's discretion.

On appeal, Plaintiffs argue the district court made no evaluation before trial under any rule with respect to Defendants' experts. *See* Appellants' Brief, p. 38. This is incorrect. Plaintiffs specifically briefed Rule 403 and Defendants provided the district court with citations showing the court had the discretion to limit the number of expert witnesses where warranted. *See* R., p. 1143; *see also* R., pp. 1292-94. The court considered the parties' briefing containing this authority. *See* Tr., Vol. II, p. 106, L. 5-6. It is clear the court evaluated such authority and acted within the boundaries of that authority when it rendered its decision. Plaintiffs simply disagree with the result reached by the court.

2. Plaintiffs' motion for limitation of defense proceedings.

On the first day of trial, Plaintiffs filed Plaintiffs' Motion for Limitation of Defense Proceedings, which requested the court not allow more than one defense attorney to participate in voir dire, present an opening, cross-examination of witnesses, and offer closing arguments, even though there were three defendants and two defense counsel.[29] *See* R., pp. 1468-70. In the motion, Plaintiffs did not cite to any authority to support their request, nor did they provide a separate supporting memorandum. *See* R., pp. 1468-70. The trial court considered the motion and the arguments of counsel on the same day. *See* Tr., Vol. II, pp. 215-18.

The court denied Plaintiffs' Motion for Limitation of Defense Proceedings. The court did not summarily deny the motion; rather, the court reasoned and held, in pertinent part, as follows:

[29] In Appellants' Brief, Plaintiffs refer to this document as their "Objection to Defense Proceedings." *See* Appellants' Brief, p. 36.

> The motion will be denied. There are three identifiable legal interests at issue here put there by pleadings, not by anything the court has done, nor by the subsequent procedures. And it appears to me, from what I have seen in this case up to this point, that the interests – the legal interests of Dr. Morrison (sic) and Emergency Medicine of Idaho are in alignment, and that is indeed demonstrated by the fact that they have the same counsel.
>
> I do not see that same, necessarily, throughout the proceedings, alignment between [Dr. Franklin] and Emergency Medicine of Idaho and St. Luke's. . . .
>
> Anyway, the fact of the matter remains that we also have two separate lawsuits that have been consolidated for the purpose of trial and other matters. But this was filed separately by the plaintiffs' choosing, a separate lawsuit against St. Luke's and a separate lawsuit against EMI. And EMI alone would be, I think, for that reason, entitled to legally say that "I am entitled" -- that they are entitled to separate representation. But most importantly, this has gone forward as a three-way lawsuit; it will continue in that fashion.

See Tr., Vol. II, p. 218, LL. 17-25 - p. 220, LL. 1-5. Thus, the court reasoned the Plaintiffs had elected to sue three parties, in two separate lawsuits which were later consolidated, and recognized that while the interests of Dr. Franklin and Emergency Medicine of Idaho were aligned, St. Luke's had independent interests in the suit. Therefore, the court found the parties were entitled to separate representation. This decision was within the court's discretion. Plaintiffs have cited no authority on appeal to show otherwise.

Subsequently, Plaintiffs again moved, as an alternative to a mistrial, to limit the defense attorneys to one for each direct examination, cross examination, and closing. *See* Tr., Vol. II., p. 315, LL. 2-9. The district court denied this motion and, in doing so, provided additional explanation of its reasoning. *See* Tr., Vol. II, p. 315, LL. 12-25 – p. 316, LL. 1-22. The court stated the following:

> The motion will be denied, but a couple of comments to go along with it: One, the interest of St. Luke's and Dr. Franklin and EMI are closely aligned. I agree with that. But the events of last week show that they are not identical. St. Luke's is vicariously liable in this case, and they have, I think, the right to appear and be certain that their interests are protected. And, in the event there is another settlement -- which is entirely possible between now and the end of this trial -- then St. Luke's has to be in the position to have protected its record because it will be the one that will be bearing the brunt of the verdict.
>
> So that tag-team approach, as you say, is, to some extent, a creation of the plaintiffs' choosing to sue the parties in the fashion that it did and the fact I have two separate cases. I have a separate case against EMI, then the case against St. Luke's. They are not in the same case. They are consolidated for trial, but they have not been -- they are still two separate cases.
>
> So for that reason, that motion will be denied. I will, however, caution the parties that I may do some limitation on closings so that it is not unfair to the plaintiff to have to answer as to all parties. I may require the parties to share closings; I haven't made up my mind about that. I'll be thinking about that, because if this goes all the way through with three people, I think there is an element of unfairness for the plaintiffs to have to have two people arguing the very same -- the very same facts and legal theories. But we will take that up as time goes by.

See Tr., Vol. II, pp. 315-16, LL. 1-22. This explanation further solidifies that the court's decision was within its discretion, and it should not be disturbed on appeal.

3. <u>Plaintiffs' motions for mistrial</u>.

In their brief, Plaintiffs discussed three motions for mistrial, which they raised on consecutive days of trial. *See* Appellants' Brief, p. 37. As with their Motion to Limit Defense Proceedings, the motions for mistrial were based upon Plaintiffs' contention that it was unfair for the court to allow two sets of defense lawyers to participate in the case. *See* Tr., Vol. II, p. 227, LL. 10-16; Tr., Vol. II, pp. 313-15, LL. 1-10; Tr., Vol. II, p. 652, LL. 12-17. The district court

denied the motions. *See* Tr., Vol. II, p. 227, LL. 17-20; Tr., Vol. II, pp. 315-16; Tr., Vol. II, p. 652, LL. 12-17.

Although on appeal Plaintiffs raise the motions for mistrial, Plaintiffs do not explicitly allege or argue the district court erred in denying those motions. Plaintiffs have not cited to any authority to show the denial of the motions for a mistrial was in error. Accordingly, to the extent Plaintiffs attempt to claim any error with respect to the denial of these motions, such a claim fails to comply with Idaho Appellate Rule 35(a)(6). Additionally, Plaintiffs cannot allege such an error for the first time in their reply brief. *See Bell*, 157 Idaho at 749, 339 P.3d at 1153 (2014).

Even if Plaintiffs had properly presented the issue and arguments regarding the district court's denial of the motions for mistrial, the district court's decisions were well within its discretion. Mistrials are governed by Idaho Rule of Civil Procedure 47(u). A motion for mistrial is directed to the trial court's sound discretion, and its ruling will not be disturbed unless there is shown such an abuse of discretion that a party's rights are prejudiced. *See Weinstein*, 149 Idaho at 312, 233 P.3d at 1234; *see also Watson v. Navistar Intern. Transp. Corp.*, 121 Idaho 643, 827 P.2d 656 (1992). In other words, "[t]he decision whether to declare or deny a mistrial is a matter within the discretion of the district court if the court determines that an occurrence at trial has prevented a fair trial." *Johannsen v. Utterbeck*, 146 Idaho 423, 431, 196 P.3d 341, 349 (2008) (citing I.R.C.P. 47(u); *Van Brunt*, 136 Idaho 681, 39 P.3d 621).

The district court recognized the interests of the parties in defending their action and found the issues complained of by Plaintiffs were created, in part, by Plaintiffs' own decision to bring two separate lawsuits which were consolidated for trial. *See* Tr., Vol. II, p. 315, LL. 12-25

– p. 316, LL. 1-22. Plaintiffs have not demonstrated the district court's decision was an abuse of discretion. Therefore, if the Court considers any alleged error with respect to decisions denying the motions for mistrial, the district court's decisions should be upheld.

D. The District Court Acted Within Its Discretion With Respect To Plaintiffs' Rebuttal Witnesses.

The district court acted within its discretion with respect to the issues relating to Plaintiffs' rebuttal witnesses, including the denial of Plaintiffs' attempt to use Dr. Torres' deposition testimony as a substitute for Dr. West's rebuttal testimony and the court's decision to allow Plaintiffs to utilize Dr. Worst only as a rebuttal expert but not in their case-in-chief. A review of these decisions shows the court acted within its discretion, that the decisions did not affect substantial rights, and that any alleged errors with respect to the same were harmless.

1. Plaintiffs' attempt to use Dr. Torres as substitute rebuttal expert for Dr. West.

The district court acted within its discretion when it denied Plaintiffs' request to read portions of Dr. Torres' deposition transcript into the record as purported rebuttal testimony. Dr. Torres had not been subpoenaed, Plaintiffs failed to make a showing that Dr. Torres was unavailable, and the testimony to be offered was either irrelevant or constituted an improper attempt to use Dr. Torres as an untimely disclosed expert.

Plaintiffs sought to use Dr. Torres as a "substitute expert rebuttal witness" for Dr. West.[30] *See* Appellants' Brief, p. 39 (emphasis added). On appeal, Plaintiffs contend Dr. West was unavailable due to the purported lengthening of the trial. *See* Appellants' Brief, p. 39. The

[30] At trial, Plaintiffs' counsel argued Dr. Torres would not be used to offer expert opinions, but Plaintiffs' counsel has apparently dropped this pretense on appeal by acknowledging Dr. Torres was offered as a "substitute expert rebuttal witness . . . ." *See* Appellants' Brief, p. 39.

record does not support Plaintiffs' contention. On Friday, August 22, 2014, as the trial was nearing a close, Plaintiffs had not even decided whether they would call Dr. West. Plaintiffs expressed concerns relating to the cost of having Dr. West testify and advised Dr. West would not be available to testify the following Wednesday when it was anticipated their rebuttal testimony would be presented. *See* Tr., Vol. II, p. 1444, LL. 3-25 – p. 1445, LL. 1-3. To accommodate Dr. West's schedule, the court ruled Plaintiffs would be permitted to call Dr. West at noon on Monday, August 25, 2014. *See* Tr., Vol. II, p. 1445, LL. 4-10. However, on Monday Plaintiffs' counsel advised Dr. West was not available to testify that day and would not be called to testify at all. *See* Tr., Vol. II, p. 1453, LL. 20-25 – p. 1454, LL. 1-3. Thus, it appears Dr. West's unavailability, if any, was related to Plaintiffs' concerns regarding costs and their decision to contact him on the weekend prior to his appearance rather than any alleged lengthening of the trial. Notably, Plaintiffs did not attempt to offer Dr. West's rebuttal testimony via any other means.

Plaintiffs then attempted to use Dr. Torres as an alternative rebuttal witness by reading portions of his deposition testimony into the record. *See* Tr., Vol. II, p. 1454, LL. 3-13. However, the court had previously ruled on St. Luke's motion in limine, which was joined and argued by Defendants,[31] that Plaintiffs would not be permitted to read excerpts from Dr. Torres' deposition because, in part, Dr. Torres was either not a relevant fact witness or he was being offered for expert testimony when he had not been previously disclosed as an expert. *See* Tr., Vol. II, pp. 875-76. On appeal, Plaintiffs have not alleged the district court erred in this initial

[31] *See* Tr., Vol. II, p. 869, LL. 19-25 – p. 876, LL. 1-9.

decision. Instead, Plaintiffs argue the district court erred in its subsequent decision to preclude Plaintiffs from again attempting to read portions of Dr. Torres' deposition into the record as purported rebuttal testimony. *See* Appellants' Brief, p. 40.

The district court acted within its discretion when it denied Plaintiffs' request to read portions of Dr. Torres' deposition transcript into the record for several reasons. *See* Tr., Vol. II, p. 1456, LL. 21-25 – p. 1458, LL. 1-2. First, the court reasoned that to the extent Dr. Torres was being offered as a fact witness only, his testimony was irrelevant since Dr. Torres was not involved in any way with the treatment of the decedent. *See* Tr., Vol. II, p. 1457, LL. 8-13. Dr. Torres had no knowledge of or involvement with the case. Furthermore, as Dr. Torres did not have any factual testimony which would actually contradict the testimony regarding the care and treatment of Mr. Morrison, he could not be offered to rebut the testimony of any witness.

Second, the court reasoned that to the extent Dr. Torres' testimony could be related to the standard of care regarding the referrals of patients to cardiologists, Plaintiffs were attempting to impermissibly utilize Dr. Torres as a previously undisclosed expert witness. As such, the court would not permit him to offer such testimony at trial. *See* Tr., Vol. II, p. 1456, LL. 21-25 – p. 1458, LL. 1-2.

Third, Plaintiffs had not attempted to subpoena Dr. Torres and the court found Plaintiffs had failed to establish Dr. Torres was unavailable, thus, allowing them to read portions of Dr. Torres' transcript at trial pursuant to Idaho Rule of Civil Procedure 32(a). *See* Tr., Vol. II, p. 1457, LL. 16-23. For any of the foregoing reasons, the district court acted within its discretion in denying Plaintiffs' request to have Dr. Torres' testimony read into the record.

Even if Plaintiffs could establish an error with respect to this decision, any error would be harmless. This Court will not reverse the trial court if an error is harmless. *Taylor,* 151 Idaho at 559, 261 P.3d at 836. "If an error did not affect a party's substantial rights, or if the error did not affect the result of the trial, the error is harmless and not grounds for reversal." *Id.* (citing *Myers,* 140 Idaho at 504, 95 P.3d at 986); *see also Martin,* 127 Idaho at 70, 896 P.2d 976, 978; *Soria,* 111 Idaho at 608, 726 P.2d at 718. Plaintiffs have not shown the omission of this testimony, which only related to how Dr. Torres practiced and did not specify what others must do to meet the standard of care, affected a substantial right or the result of trial. As such, any alleged error with respect to this decision is harmless and does not warrant a reversal of the decision.

2. Dr. Worst.

As an initial matter, Plaintiffs' arguments relating to Dr. Worst fail to comply with Idaho Appellate Rule 35(a)(6) because the arguments fail to include any citations to record. *See* Appellants' Brief, pp. 40-41. Since they fail to include citations to the record, Defendants cannot determine which, if any, specific ruling Plaintiffs allege is in error with respect to Dr. Worst. The district court made several rulings relating to Dr. Worst's testimony, which are set forth in the procedural background of the case. By failing to include any citations to the record, Plaintiffs are inviting the Court to search the record for error. However, the Idaho Supreme Court "will not search the record for error." *Greenfield v. Wurmlinger*, 158 Idaho 591, 349 P.3d 1182, 1189 (2015). The Court does "not presume error on appeal; the party alleging error has the burden of showing it in the record." *Id.* Plaintiffs have not met their burden to show error with respect to the district court's rulings regarding Dr. Worst in this matter.

However, if the district court's rulings on Dr. Worst are analyzed on appeal, it is clear the district court acted within its discretion in excluding Dr. Worst as an expert in Plaintiffs' case-in-chief since he was retained and disclosed by Respondents and had not been timely disclosed as an expert by Plaintiffs. Alternatively, Plaintiffs' arguments regarding Dr. Worst are moot because the jury never reached the issue of damages, which was the anticipated subject matter of Dr. Worst's testimony. Since the jury never reached the issue of K.M.'s claimed damages, any alleged error with respect to Dr. Worst clearly did not affect the result of the trial or any substantial right of Plaintiffs. As such, any alleged error with respect to the same is harmless and does not warrant reversal of the trial court. *Taylor,* 151 Idaho at 559, 261 P.3d at 836.

E. Defendants Should Be Awarded Attorney's Fees And Costs On Appeal Pursuant To Idaho Code § 12-121 And Idaho Appellate Rules 40(a) And 41.

Defendants request this Court award Defendants' attorney's fees and costs of this appeal, pursuant to Idaho Code § 12-121 and Idaho Appellate Rules 41 and 40(a). Idaho Code § 12-121 permits an award of reasonable attorney's fees to a prevailing party. I.C. § 12-121. "To receive an I.C. § 12–121 award of fees, the entire appeal must have been pursued frivolously, unreasonably, and without foundation." *Snider v. Arnold*, 153 Idaho 641, 645, 289 P.3d 43, 47 (2012). "Such circumstances exist when an appellant has only asked the appellate court to second-guess the trial court by reweighing the evidence or has failed to show that the district court incorrectly applied well-established law." *Id.* (citing *City of Boise v. Ada Cnty.*, 147 Idaho 794, 812, 215 P.3d 514, 532 (2009)).

In this case, Plaintiffs failed to demonstrate the trial court erred in applying well-established law in any respect. As such, Defendants respectfully request the Court grant an award to Defendants of reasonable attorney's fees pursuant to Idaho Code § 12-121 and Idaho Appellate Rule 41. Defendants also respectfully request costs as a prevailing party on this appeal pursuant to Idaho Appellate Rule 40(a).

CONCLUSION

Based upon the foregoing, Defendants respectfully request the rulings of the trial court in this matter be affirmed, in all respects, and the jury's verdict be upheld.

RESPECTFULLY SUBMITTED this 17th day of December, 2015.

POWERS TOLMAN FARLEY, PLLC

By: /s/ Nicole L. Cannon
Nicole L. Cannon

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of December, 2015, I caused a true and correct copy of the foregoing RESPONDENTS FRANKLIN'S AND EMERGENCY MEDICINE OF IDAHO'S CERTIFICATE OF COMPLIANCE to be forwarded with all required charges prepared, by the method(s) indicated below, to the following:

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/s/ Nicole L. Cannon
Nicole L. Cannon